No. 2974

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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American Trading Company (Pacific Coast) (a corporation),
Plaintiff in Error,

vs.

North Alaska Salmon Company (a corporation),
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Samuel Knight,
F. E. Boland,
Attorneys for Plaintiff in Error.

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This is an appeal from a judgment of the District Court of the United States for the Southern Division of the Northern District of California, Division No. 2, entered in the above case on the verdict of the jury in favor of the plaintiff in error but assessing only nominal damages (Trans. p. 177). As plaintiff in error and defendant in error occupied corresponding relations in the court below, they will be hereinafter designated as plaintiff and defendant, respectively. The evidence in the case is remarkably free from contradiction, which has facilitated the abbreviation of the record on appeal, and it establishes the following facts:

Statement of the Case.

For a number of years prior to the occurrence of the transaction which occasioned this suit, plaintiff, which was engaged in the business of a jobber of salmon, had purchased, deliverable in San Francisco, among other commodities, large quantities of "Archer" brand do-over salmon, from defendant, which was engaged in Alaska in packing salmon and shipping it to market. Invariably defendant had furnished plaintiff with samples of the salmon to be delivered each year prior to delivery, and not only had these samples consisted of salmon which was merchantable and perfectly edible, but also the bulk of the salmon had conformed to the samples and proved edible and eminently satisfactory to the trade.

"Do-over" salmon, so-called, is salmon which has been re-processed, i. e., re-cooked, because of the discovery of a leak in the can when it was originally cooked. If so re-processed within a very short time after the original cooking, it is perfectly edible, provided the contents, when originally put into the can, were edible and the can was sound; but if the salmon is suffered to remain in a leaky can a certain length of time before being re-processed, bacterial action causes decomposition to set in, which spoils the fish. If this spoiled fish is afterwards properly sterilized in the cooking and then canned the spoilage is arrested but the fish still remains spoiled and unedible; if insufficiently sterilized, the process of decay is accelerated. Of course, the cans

are hermetically sealed. Do-over salmon does not otherwise differ from salmon which is known as standard, but sometimes in the re-processing, salt water is added to the can to make up for the loss of juice from the fish caused by the leak in the tin, and sometimes juice derived from boiling the heads of salmon supplies the missing liquor in the tins. This, however, does not in any way affect the edibility of the fish. Nowadays, but very little do-over salmon is put on the market by reason of the use by packers of the sanitary can instead of the old fashioned solder can that was in use by defendant and others during the time herein referred to; and at the time of the transaction in question and for a number of years theretofore, despite defendant's attempt to show that do-overs should be treated with suspicion (Trans. pp. 145, 146, 152), it was shown that they were considered a perfectly legitimate article of commerce, so recognized by the U. S. Government, and in large quantities had been bought and sold in the market for human consumption at prices somewhat less than standard salmon of the same quality brought (Trans. pp. 44, 45, 48, 54, 66, 69, 91, 114, 116, 117).

In 1911, defendant packed and sold to plaintiff three thousand cases of this "Archer" brand do-over red Alaska salmon (red Alaska being the best quality of Alaska salmon offered to the trade), and they proved to be no exception to the previous years' packs of the same brand and grade of salmon, only fifteen cases, i. e., one-half of one per cent

being spoiled. That fall the parties hereto entered into the contract in controversy, providing, in part, for the supply of the same quality and grade of salmon for the following year, and reading as follows:

"San Francisco, Cal., Nov. 16th, 1911.

The North Alaska Salmon Company, of San Francisco, California, have sold and the American Trading Company (Pacific Coast) of the same place have bought all of the seller's 1912 season's pack of the following grades and brands of salmon:

No. 2 Grade of Red Alaska Salmon, labeled 'Polar King'.

Do-over Grade of Red Alaska Salmon, labeled 'Archer'.

It is understood that the quantity sold shall not exceed three thousand (3000) cases of 'Polar King' brand and five thousand (5,000) cases of 'Archer' brand.

Price of the 'Archer' brand to be eighty-five cents (85¢) per dozen, Net Cash, f. b. o. [sic] San Francisco, Cal.

Price of the 'Polar King' brand to be twenty cents (20¢) per dozen less than the North Alaska Salmon Company's price, in car lots, of No. 1 Red Alaska Salmon, f. o. b. San Francisco, Cal., Net, without the cash discount, when delivered.

Delivery is to be made within thirty days after arrival of vessels from Alaska and goods to be paid for on presentation of warehouse receipt or delivery documents.

'Archer' brand of salmon to be overhauled in San Francisco by sellers and all swells and rusty tins to be taken therefrom, after which no reclamation of any nature will be allowed.

Sellers guarantee 'Polar King' brand against swells and rusty tins but otherwise goods to be

taken 'as is', and no claim of whatever nature is to be made against seller after delivery.

Buyers have privilege of inspecting salmon before taking delivery. Sellers guaranteeing goods to be equal to the 1911 pack.

The salmon under this contract is sold subject to being packed and safely landed in San Francisco.

It is understood that the 'Polar King' label is the property of the buyer and solely under their control. But if for any reason whatsoever the buyer does not take delivery of this purchase within thirty (30) days after arrival, as above specified, then the sellers may dispose of the same at a price which is less than that named in this contract, buyer to reimburse seller for the difference.

NORTH ALASKA SALMON COMPANY,
J. P. Haller, Manager.
AMERICAN TRADING COMPANY
(PACIFIC COAST),
C. R. Morse, Secretary.
A. B. Field,
Witness."

The delivery of this salmon was preceded in October, 1912, by the furnishing, as usual, of what purported to be samples of the entire lot of do-overs, consisting of a case or two, each case containing four dozen cans. A number of these cans were opened by plaintiff, examined and all found to contain salmon which was merchantable, perfectly sweet and edible and equal in quality to the 1911 pack. When the samples were obtained defendant's manager, Mr. Haller, informed Mr. Field, manager of plaintiff's canned goods department, that the quality of this salmon was "superior to any-

thing he had ever packed or presented to us [plaintiff] and that we should obtain full prices for the same * * *" (Trans. pp. 47, 48). "Mr. Haller's assurance [was] it was the finest lot of salmon he had ever packed" (Trans. pp. 64, 65). Thereupon plaintiff sent to certain of its eastern customers some of the samples which it had thus received and on them it obtained orders for large quantities of the salmon. In consequence of the result of its examination of these samples and of Mr. Haller's representations concerning it, plaintiff in the latter part of October or early November, without then examining or even seeing the bulk of the salmon, which was in the Mission Rock Warehouse, where it had been landed by defendant on its arrival in San Francisco, took delivery thereof by directing defendant to ship nine hundred cases of it to Chicago, Illinois, one thousand cases to St. Louis, Missouri, and one thousand cases to Louisville, Kentucky, and thereupon paid to defendant the sum of $16,961.30, which was the full purchase price for the entire lot of salmon, in two installments, i. e., $9,821.30 on November 18, 1912, and the balance, $7,140.00, eight days later.

The remaining 2,100 cases remained in the warehouse to be put on the market in due season, and they were transferred to plaintiff on the warehouse books November 26, 1912 (Trans. p. 151).

The answer alleges that on the arrival of the salmon at San Francisco defendant overhauled the "Archer" brand and removed therefrom all swells

and rusty tins (Trans. p. 30), and one of defendant's employees testified that he overhauled this salmon at the warehouse, separating the rusty tins and swells and light cans from the remainder (Trans. p. 158). It also appears that shortly thereafter 190 cases of this salmon were dumped overboard by the warehouse under defendant's orders (Trans. pp. 150, 151) prior to the time when delivery of any of the salmon was made to plaintiff.

Immediately after the arrival of the salmon at the various eastern places to which it had been consigned and at a number of other places to which it was being distributed therefrom by grocery stores in the normal course of business, the contents of can after can of this salmon, which had been opened for consumption, and from external appearances indicated that the salmon was sound and edible, were discovered to be sour, putrid and rotten. This led to a more general examination of the salmon in stock at the various eastern stores with startling results.

We quote some of the eastern testimony on the subject.

Frost, of Chicago, who has handled canned fish of various kinds for thirty years, including the entire 1911 pack of "Archer" brand do-over salmon, and to whom 900 cases of this 1912 pack had been consigned shortly after its arrival at San Francisco (Trans. p. 114), testified:

> "We drew some samples from the consignment. From these samples we cut some samples

> running as high as 6 out of 10 cans absolutely unfit for food. They were so bad you wouldn't care to stay in the room after they were cut; some of them were absolutely dry and others were very soft. I presume we cut 100 or more cans selected at random from various cases; I would say that the salmon would run at least 35 to 50 per cent absolutely unfit for food. The original examination was made in the latter part of February, 1913; and from that time on we tried to sell to various people. Before March 1st on one occasion I cut 10 cans and found 7 of them bad—unfit for food. April 1st I personally drew 25 samples of the salmon; I found 8 cans that were first-class; 7 would pass without serious criticism, although 2 of them were very dry, 11 of them bad, 8 of them so bad that when we cut them we had to put them out of the office immediately. * * * After we discovered the condition of the salmon we notified the shippers and to protect ourselves we notified the Health Department of the City of Chicago."

Armstrong, Chief of the Bureau of Food Inspection in Chicago, testified that he ordered this salmon to be condemned as unfit for human consumption as the result of his examination and the analysis of the city chemist. "The goods were in a condition of putrefaction" (Trans. p. 118).

Costello, Food Inspector of the Health Department of that city, said that the salmon was putrefied and in selecting their samples the department did not take any swells "as they condemned themselves". He testified that the proportion of samples examined that were unfit for consumption was about 80 per cent (Trans. p. 119).

Creasey, who did the buying for certain wholesale grocery houses in the Mississippi Valley (Trans. p. 120), said that he examined some of these cans belonging to another consignment of the "Archer" brand salmon and he remembered finding just one that was good. "The salmon was spoiled, bad, smelly, looked mushy" (Trans. p. 121); and he testified that he had never had any trouble with do-over salmon before (Trans. p. 122).

Hayes, who was manager of a grocery house in Evansville, Indiana, testified that more than 75 per cent of the cans he examined were bad, including some swells, "none were good" (Trans. p. 122).

Similar testimony was given by Harker, manager of a grocery company at St. Louis (Trans. p. 123), with reference to another consignment of the salmon.

Dummeyer, who was the cashier of the same grocery company, found that one-half to two-thirds of the several dozen cans which he opened were decayed and rotten, saying "there were only about five, or at the most, ten per cent of the people who did not object, did not send it back" (Trans. p. 124). None of the salmon which he examined consisted of swells, and "cans that appeared to be good burst open on the shelves in the stock room; some of them within a month's time, with a very bad odor" (Trans. p. 125).

A Deputy United States Marshal testified, in part, that in carrying out the order of the court

in one of the condemnation proceedings hereinafter referred to, he

> "then opened some of those cans and the odor was something fierce. I destroyed the salmon by fire Sept. 29, 1913, pursuant to order of court. Before doing so I opened two of the cans; they were simply rotten. When I started the fire the odor was so bad that it ran everybody out of the dump. There was a horrible stench. There was a bad odor before we began burning them" (Trans. p. 126).

Further testimony regarding the horrible character of the salmon was given by the bookkeeper of a grocery company at Indianapolis, Indiana (Trans. pp. 126-127); and

The manager of the Louisville Grocery Company (Trans. p. 127) testified that he examined a large quantity of the salmon and that about 90 per cent of it "was rotten" and he afterwards turned it over to the city health authorities of Louisville (Trans. p. 128).

Fulton Gordon, a salmon broker of Louisville, added to the cumulative testimony on this point (Trans. p. 129), and the City Chemist and Bacteriologist of Louisville testified that on December 19, 1913, he examined 30 samples of the salmon and found 90 per cent of it "unfit for human consumption", including a number of swells caused by germ development and bacteria (Trans. pp. 130-131).

A Deputy United States Marshal for the Western District of Kentucky, who was made the custodian of some of this salmon after it had been seized by

the Government, testified that when destroyed it was unfit for human consumption (Trans. p. 131).

Naturally, complaints poured in from these and other eastern sources to plaintiff regarding the condition of the salmon, which led plaintiff to make an examination of the 2100 cases stored in the warehouse in San Francisco. Without opening each tin it was impossible to determine whether or not the contents were edible, except in a few instances where gas, caused by air entering the can where there was a small hole insufficient in size to allow the gas to escape, or insufficient sterilization, had caused one end of the can to bulge out and thereby show that the contents were decomposing. The examination of the warehouse salmon necessitated the opening, therefore, of a great many cans selected in such a way as to be fairly representative of the condition of the bulk of the salmon, and this examination was made by three men, including a professional overhauler of canned salmon. The first examination was made in February or March, 1913, and disclosed that about 25 per cent of the salmon was "rotten", as Mr. Field, the manager of plaintiff's canned goods department, expressed it (Trans. p. 51) or "inedible", as Mr. C. R. Morse, plaintiff's secretary, rather euphemistically testified (Trans. p. 81). This was followed by a second examination, which occupied several weeks, and showed that over 30 per cent of the salmon, excluding swells and rusty tins, was rotten (Trans. pp. 52, 82). Thereupon the Federal authorities seized the stuff and libeled it as

contraband and adulterated under the Congressional Pure Food and Drug Act, approved June 30, 1906. One of the witnesses whom the Government called to prove the condition of the fish, Mr. Frank D. Merrill, a chemist employed in the United States Food and Drug Inspection Service in San Francisco and of conceded ability and standing, testified (Trans. p. 70) that he examined the salmon in July, 1913, and found 39 per cent of the cans contained

> "salmon that was unfit for human consumption. The outward condition of the tins which I examined appeared to be in good condition. I did not examine any swells. I could not tell from the outside of the tins what was the condition of the contents."

He made his test by the use of the five senses.

> "It was self evident when the tins were open what the condition of the contents was. The 39 per cent of the salmon was in various stages of decomposition, some of it very putrid and in some cases it was sour, sour smell and in others it might be termed as very stale, a condition such that it would be unfit for food. * * * If food is properly canned and kept in proper condition as to temperature, it will keep for a number of years" (Trans. pp. 70, 71).

A regularly appointed food and drug inspector of the United States Department of Agriculture testified in the present case that he had taken samples of this salmon from the warehouse, excluding therefrom any cans that gave evidence of swells or whose outward condition indicated that the contents were not good (Trans. pp. 73, 74), and that

some of these cans had been sent to the Seattle laboratory of the United States Government on the 26th of December, 1913 (Trans. pp. 84, 85). An examination of 48 of them made there by a Government expert showed that

> "16 were actually spoiled, 12 cans were more or less soft and stale, showing incipient decomposition, 15 cans were what I would call as passable and 5 of the tins were good. There were one swell and one leak among the bad tins. The leaky cans did not have a vacuum, the others did. Other than those two cans there was no external indication of damage" (Trans. pp. 85-86).

The swelled condition of the salmon was, in his opinion, caused by "spoilage" before the tins were last sealed and sterilized" (Trans. p. 87).

Furthermore, the complete original record of the suit brought by the Government against the 2100 cases of warehoused salmon, tried in the same court which tried the instant case and showing the condemnation of the entire lot as adulterated within the meaning of the Pure Food and Drug Act of Congress at the time of its importation into San Francisco and its delivery to plaintiff, was offered by the latter and refused admission as evidence, apparently on the ground "that the defendant was not a party to that proceeding" (Trans. p. 97), although the due publication of the monition gave notice to the world, including defendant, of the pendency of that case. Duly certified copies of similar condemnation proceedings brought, respec-

tively, against other portions of this salmon shipped east, in the United States District Court for the Eastern Division of the Western Judicial District of Missouri, the United States District Court for the Southern District of Illinois, Northern Division, the United States District Court for the District of Indiana and the United States District Court for the Western District of Kentucky, all terminating in decrees for the confiscation and destruction of different lots of this salmon because it was unfit for human consumption, were likewise offered by plaintiff and refused admission as evidence, apparently on the same ground.

Between the Federal authorities acting under Decrees of Condemnation rendered in these Courts, and the City Health authorities of Chicago, Illinois, and Louisville, Kentucky, respectively, over 4000 cases of the salmon in question were destroyed.

On behalf of defendant, one dealer in canned foodstuffs, who had never dealt in this brand of salmon nor handled any do-overs packed by defendant, testified that "a large number of cans will be bad in re-processing or re-cooking, no matter how careful the canner is" and that the do-over was known as a "speculative possibility" (Trans. pp. 145, 146); and another witness who was in the merchandise brokerage business, including canned salmon, said, when called by defendant, that any one buying do-overs "takes chances" (Trans. p. 152). Hale, one of defendant's witnesses, testified that in 1912 and for a number of years theretofore, he

has supervised for defendant the pack of salmon in its four Alaska canneries, that there was no change in the method of packing during that time, and that "the condition of the do-over salmon as to *quality* in the summer of 1912 was just the same as the 1911 pack" (Trans. pp. 146, 147). He further testified that do-overs were not permitted to and did not stand more than three days before being re-cooked, *"so far as I know,"* and that there was no difference in the degree of care in handling the salmon at the various canneries of defendant between that year's pack and the pack of previous years. He also testified that he drew the samples of the salmon for plaintiff indiscriminately without attempting to pick out any particular cans for sample purposes and admitted that the Pacific Coast pack in 1912 was over a million cans in excess of the pack of the previous year, though the number of employees at defendant's canneries had not increased. It appears from his testimony that he only knew in a general way what was going on at the canneries, inasmuch as he was obliged to make the circuit of them by water, only going to the smaller canneries two or three times a season, and that the Alaska Red Salmon and do-overs were packed at all of the different canneries (Trans. pp. 146-148). He said: "The only way I have of knowing that the cans to be re-processed have not stood longer than three days, except what the foreman tells me, is to notice whether or not the number of such cans has increased

from time to time'' (Trans. p. 148). The defendant finished packing the salmon in the latter part of July, 1912 (Trans. p. 149).

Julius Phillips, called on defendant's behalf, said that Getz Brothers handled some of the 1912 pack of "Archer'' brand do-over salmon, sold it to the trade and had no complaints about it (Trans. p. 157).

Another witness for the defendant testified that he was a foreman of one of defendant's four canneries in 1912, and that they never allowed salmon to stand over a couple of days before re-processing it (Trans. p. 158).

Defendant's Chinese boss, who worked at the same cannery, testified that he had a contract to mend leaks, and that if he put up salmon that was "no good'' he was charged $1.50 a case and there was no charge made against him for 1912, because everything was good that year as it was in 1911 (Trans. p. 159). He does not appear to have been present at all of defendant's canneries, but according to one of defendant's witnesses (Trans. pp. 150, 151), the boss should have been charged with $1.50 a case on at least 192 cases of admittedly bad do-over salmon.

Another witness, who was employed as a superintendent at another of the defendant's smaller canneries, testified that defendant used the same process in packing "Archer'' brand do-over salmon in 1912 as it did in 1911. "We do not allow do-overs to stand at all if we can help it; sometimes they

stand probably from 36 to 40 hours. That has always been the rule. They did not stand any longer in 1912 than in any other year'' (Trans. p. 159).

There were other canneries where this do-over salmon was being packed by defendant (Trans. p. 160), but no testimony was offered regarding the manner of re-processing the salmon there.

This testimony on behalf of the defendant is largely negative in character, i. e., that at *some* of the canneries do-over salmon was not permitted to remain more than a limited time without being re-processed. The testimony on behalf of the plaintiff on the subject was affirmative, positive and overwhelming, to the effect that within a short time after the salmon had reached San Francisco and had been delivered to plaintiff, it was found to be, in great part, unfit for human consumption.

Said the Circuit Court of Appeals for the Third Circuit in the case of *U. S. v. 443 Cans of Frozen Egg Product, post,* at p. 593, in referring to testimony tending to show that a certain foodstuff was decomposed:

> ''Unless in some way counteracted, this testimony would seem conclusive of the fact that this product was decomposed. This it is sought to do on several grounds: First, that other samples taken from the same cans were tasted, smelled and cooked by the claimant's witnesses, without any odors or other evidence of the decomposition being discovered. But this testimony, while it is persuasive as to the particular samples used by claimant's witnesses, is at best but negative, and does not disprove the positive

> and affirmative evidence as to the foulness of the samples used by the Government witnesses. * * * To us it is clear that testimony of the limited, negative character referred to above cannot avail to counteract and discredit the strong positive proof of decomposition found in the testimony of those who testified thereto."

The query naturally arises, When did the salmon get in this condition? Upon this point the testimony is all one way without any contradiction whatsoever. It must be first borne in mind that fish, like other food, if properly canned and kept in proper temperature will keep for many years, or "indefinitely", as some witnesses expressed it (Trans. pp. 52, 53, 71, 96).

In this connection, a misprint on page 85 of the Transcript of Record should be noted. The word "an" before the words "artificial heat" should read "no".

Merrill, a Government chemist of high standing, said that the 39 per cent of the warehoused "Archer" brand salmon which he found inedible, was, in his opinion, in that condition at the time it was last processed and was decomposed before it left the cannery. Said he further:

> "Decomposition does not progress after sterilization in hermetically sealed cans. That entirely stops decomposition at that point. Sterilization does not remove smell. If it is in a hermetically sealed tin the smell stays right there. The point I am trying to make is this: that if a fish is rotten, or is in the process of rotting when put in the tin and the tin is sterilized, that then decomposition stops at that

> point, that is, your finished product is in exactly the same condition as to decomposition that it was when it was last processed. Now, of course, processing makes a difference physically in the texture. You cook that fish and there is a physical difference there, but speaking from the standpoint of decomposition, the condition as to decomposition is exactly the same after processing as it was before, because decomposition stops. The decomposition is caused by bacterial growth and they are killed by the processing, that is, if it is completely sterilized; if it is not completely sterilized and decomposition does continue, then you have got a swelled tin. I am speaking of these tins, none of which were swelled'' (Trans. p. 72).

He examined no swells (Trans. p. 70).

Hilts, who examined the salmon in the Seattle laboratory of the Department of Agriculture in January and April, 1914, and who, previous to his employment in the Government service, had been connected with Armour & Co. for several years assisting in their investigations connected with the canning of meats, agreed with Merrill, saying that the fish was spoiled before the tins were last sealed and sterilized. He testified that the swelled tins occurred through the process of decomposition that was going on in the can by action of the bacteria.

> ''All the spoiled ones wouldn't swell because some of them had been sterilized after they spoiled, thereby killing the bacteria and preventing the further evolution of gas and thereby the can retained its vacuum which it had at the time it was put into it. The cans that were not swelled contained material that was originally spoiled when the cans were

> finally re-processed; decomposition was not proceeding any further, but decomposition was proceeding in the tin that was swelled and producing a gas."

The meat in the cans had commenced to decompose before the cans were last sealed and sterilized because they were not swelled. Never had he known of a swell developing in salmon a year and a half after it was packed. Incipient decomposition in some of the cans that witness examined was checked by sterilization and had not progressed since. The 16 cans that the witness pronounced bad had been permitted to spoil before the last processing was done. He said that if all the bacteria were not killed in the cooking process, decomposition might develop in a hermetically sealed can. The bacteria in fish are presumed to be killed by application of heat in the cooking process (Trans. pp. 87-90).

Hart, Chief of the Western Division of the United States Bureau of Chemistry in the Department of Agriculture, who has made a thorough study of almost all of the canning that is done in this country, testified that the salmon was either in bad condition at the time it was canned or was in good condition and improperly processed and canned or was in good condition and properly canned and then by some accident to the cans air was admitted with bacteria and other contaminating elements (Trans. p. 91). No accident appears to have happened to any of the cans.

Swift, a canner of long experience and who formerly built and operated a cannery of his own, testified on the subject:

> "If a can of do-over salmon was found in a bad state of decomposition when the can was opened, say a year after it was packed, I would say that it was in that condition when the can was mended and hermetically sealed, must have been decomposed at that time; it would not decompose any more after it was sterilized by cooking and hermetically sealed" (Trans. p. 96).

Finally, Dr. Schneider of the University of California, who has taught bacteriology for 25 years, is employed in the State Food and Drug Laboratory and has had experience for the same length of time in the examination of canned food products, including salmon, testified with considerable degree of particularity regarding the decomposition of fish (Trans. pp. 132-135), saying that under the conditions brought out in this case there was an improper processing of the salmon or the use of decomposed material at the time the salmon was canned, and that under ordinary conditions decomposition sets in immediately, followed by inedibility as soon as the temperature after the cooking is sufficiently reduced. Decomposition then proceeds slowly or rapidly, depending upon temperature conditions largely. In his opinion, from the conditions existing in this case, the salmon was rotten when it was sterilized. On cross-examination, he testified that canned salmon properly processed will not produce a swell whether there are seeds of decom-

position in it at the time of sterilization or not; and if a large number of swells develop after the processing, it indicates that the sterilization was not such as to arrest the decomposition that had set in. He said further that it was evident that decomposition had set in at the time of shipment. Decomposition does not proceed after sterilization but sterilization does not remove the decomposition; and salmon defectively processed and hermetically sealed will become inedible in a few days even at a normal temperature.

It is interesting to note in connection with his testimony that a bacteriological and microscopic examination of the salmon would have shown from 25 to 100 per cent more defective salmon than the organoleptic tests, or tests by the senses, employed by several of plaintiff's witnesses (Trans. pp. 132-133).

Defendant offered no testimony as to the condition of the salmon after it had been canned, or as to the cause of its putrid condition; and it is in evidence that about three months' time elapsed between the time when the packing of the salmon was completed and the time when it was delivered to plaintiff (Trans. pp. 46, 49, 51).

It may be here remarked that the probable reason why defendant was so negligent in putting up the pack of do-overs for the year 1912 was intimated in the testimony of Mr. John S. Hume, one of

plaintiff's witnesses, who said, speaking from practical experience as a canner:

> "What is done" in the re-processing of salmon "depends upon the amount of work that is necessary to be done in the cannery, how much fish there are on hand; if there are a great many fish the can is set aside; ordinarily if there is not much fish in the cannery the can is taken to the mender's bench and it is then re-mended and re-cooked" (Trans. p. 76).

And one of defendant's witnesses intimated that in a heavy run of fish the men and the cannery get behind in their work (Trans. p. 154). Now, as we have heretofore observed, there was an increase of over 1,100,000 cases, i. e., about 40 per cent, in the Pacific Coast salmon pack of 1912 over that of 1911, with no corresponding increase in the number of defendant's employees to take care of its share of this extraordinary run (Trans. p. 147). The most charitable view, then, to take of defendant's delinquency in the preparation of this salmon for market is that it was unable to properly handle the fish that were caught and brought to its canneries and deferred the re-processing of the do-overs until the fish had commenced to spoil.

We have thus dwelt somewhat at length upon the principal facts of the case to show that beyond the peradventure of a doubt, and without any contradiction whatsoever, the do-over salmon delivered to plaintiff in 1912 was decomposed in great part, and hence inedible, commercially worthless and a

contraband article of commerce within the provisions of the Federal and State Pure Food Acts.

Furthermore, for this salmon defendant took plaintiff's money and not only gave it nothing of value in return therefor, but what was far worse, attempted to unload upon an unsuspecting market foodstuff in such a dangerous condition that but for plaintiff's prompt action it might have been fatal to more than one consumer; and defendant's manager expressed no surprise when he was told of the complaints which had been received from plaintiff's customers, but simply declined to consider any claim whatever (Trans. p. 51).

With these facts before us, we have a word or two to say with reference to the pleadings before discussing the specifications of error.

The Pleadings.

The theory of the plaintiff is and was that, as expressed in its amended complaint, having entered into, with defendant, a valid and enforceable contract for the sale and delivery by the latter to it of 5,000 cases of "Archer" brand salmon for human consumption, and defendant having, without knowledge thereof by plaintiff, shipped from Alaska and delivered to the latter at San Francisco, an inedible, contraband and utterly worthless article of food in violation of the pure food laws of the United States and of the State of California, and of the contract

taken in connection therewith or otherwise, plaintiff received no consideration for the purchase price paid by it therefor (second count), or, as otherwise expressed in the amended complaint (third count), was damaged by the breach of contract by defendant. The first count of the amended complaint in the form of a common count of *indebitatus assumpsit* was demurred to specially and eliminated from the complaint; and, although the second and third counts are almost identical, except that the former alleged a total failure of consideration furnished to plaintiff for the money paid to defendant, and the latter count made plaintiff's damages the gravamen by reason of the defendant's breach of contract to furnish edible salmon, nevertheless defendant's demurrer, variously stated, to the second count was overruled and a similar demurrer to the third count was sustained for some reason which we have not been able to ascertain. The fourth count based upon an estoppel withstood the attack thereon by demurrer. Hence the case was necessarily tried, not upon the theory of damages for breach of contract, although portions of the court's charge seemed to be based upon the third count which was eliminated from the complaint, but upon the theory of a total failure of consideration by defendant which entitled plaintiff to recover the purchase price paid for the spoiled salmon delivered to it, and also upon the theory of an estoppel arising from defendant's conduct respecting the contract, with

which we are, however, for the moment not particularly concerned.

Inasmuch as the defendant received the purchase price of the salmon without giving any consideration therefor, the money so paid may be recovered as money advanced. This point was adjudicated in the case of

S. C. V. Peat Fuel Co. v. Tuck, 53 Cal. 304,

where the court held that money so paid could be recovered as money advanced

> "on the ground that the consideration upon which it was paid had wholly failed".

In the case of

Smith v. Blandin, 133 Cal. 441, 444,

affirming and quoting from the case of

Richter v. Union Land etc. Co., 129 Cal. 367,

it was held that

> "In all executory contracts the several obligations of the parties constitute each reciprocally the consideration of the contract; and a failure to perform constitutes a failure of consideration—either partial or total, as the case may be—within the meaning of Sec. 1689 of the Civil Code".

See, further:

Maher v. Riley, 17 Cal. 415;

Rose v. Foord, 96 Cal. 152;

S. C. V. Peat Fuel Co. v. Tuck, supra;

Russ Lumber & Mill Co. v. Muscupiabe Land and Water Co., 120 Cal. 521; 65 Am. St. Rep. 186, 191;

Bank of Commerce v. Ruffin, post;
Keller v. Hicks et al., 22 Cal. 457; 83 Am. Dec. 78;
Aultman-Tailor Co. v. Trainer, (Ia.) 45 N. W. 757;
Toledo Saving Bank v. Rathmann, 43 N. W. 193;
Brown v. Weldon et al., (Mo.) 13 S. W. 342;
Hecht v. Wright, (Colo.) 72 Pac. 48;
State v. Smith, (Ohio) 68 N. E. 1044;
Crossman v. Lurman, post.

The plaintiff may confine his remedy to the recovery of the consideration paid by him to defendant for the salmon.

Richter v. Union Land etc. Co., supra.

The court said in the case of

Minor v. Baldridge, 123 Cal. 187, 191:

> "The action is not based upon a breach of contract, nor is it necessary to have a rescission of the contract to enable plaintiff to maintain his action. The theory is, that the money was obtained upon a false representation that it had become due under the contract, by the performance of the condition precedent by the corporation. This might all be, and the contract still remain in force. In such event, the corporation may yet perform and become entitled to demand and enforce payment from plaintiff."

In the case of

Crocker-Woolworth Nat. Bank v. Nevada Bank, 139 Cal. 564, 570,

the court said that it must not be forgotten that an

> "action [for the recovery of money paid by mistake] even when in form of a legal action for money had and received, always addresses itself to the equitable consideration of the court".

If defendant had sued for the recovery of the purchase price of the salmon the court would, under these authorities, have refused to grant affirmative relief, and by parity of reasoning it will refuse a defensive relief to defendant when sued for the repayment of the purchase price.

In the case of

> *Robinson v. Bright's Executor,* 60 Ky. (3 Met.) 30,

it appeared that plaintiff had purchased a slave from defendant's testator who at the time of purchase was diseased, sick and worthless and that plaintiff in ignorance thereof had paid the purchase price. The court first cited the case of *Griswold v. Taylor's Adm'r.,* (Ky.) 1 Met. 228, wherein it was held that under similar circumstances the vendor could not recover the purchase price, and then said:

> "Now the question is presented, can money, which has been paid for a chattel of no value when sold, and where there is thus a total failure of the consideration upon which the payment was made, be recovered back?
>
> We are unable to perceive any difference in principle between the two cases. If it is unjust and unconscientious in the one to coerce the payment of the money, in the other case it is equally against the justice and good conscience to retain the money. In either case the party

is compelled to part with his money without having received any value whatever for it.

And there is ample authority for the recovery back, by an independent action, of money paid upon a consideration believed at the time of the contract and payment to be valuable, but which was in fact, at the time, of no value whatever.

In Spring v. Coffin, 10 Mass. 32-35, it was decided that a party who had paid money upon a bargain by which nothing passed to him, had his remedy for the money, 'as paid for a consideration which has failed'. In Woodward v. Cowing, 13 Mass. 216, it was said by the court, 'where money has been paid upon a consideration which has failed, it may certainly be recovered back by the party who shall have paid it'. (Neel v. Deens & Smith, 1 Nott & McCord, 210; Wharton v. O'Hara, 2 Nott & McCord, 65.)

In Murray & Co. v. Carrett & Co., 3 Cal. 373, the same principle was approved by the Court of Appeals of Virginia.

In Murray v. McFerlan, 2 Burrows 1012, it was held (opinion by Lord Mansfield) that an action could be maintained for money paid upon a consideration which happened to fail, and the defendant ought, *ex aequo et bono,* to refund.

The same doctrine is recognized by the supreme court of Massachusetts in the case of Harrington v. Stratton, 22 Pick. 510, although that was an action by the payee against the maker of a promissory note. (See Colville v. Besley and others, 2 Denio 139; 5 Humphreys, 496, Charlton v. Lay, opinion by Judge Green.)

In the case now before us it was alleged that the negro, at the date of the sale, was unsound and of no value, and that there was consequently a total failure of the consideration upon which the purchase money had been paid. The pe-

> tition stated facts sufficient to constitute a cause of action, and which, if found to be true, would have warranted a recovery by the plaintiff."

The case of

Stone v. Frost, 61 N. Y. (16 Sickles) 614,

was brought to recover back money paid by plaintiff as the purchase price of a quantity of grape roots. Plaintiff's evidence tended to show that the roots, when delivered, were dead and perfectly worthless and that plaintiff tendered them back. There was a judgment for plaintiff, which was affirmed. The headnote reads as follows:

> "An action can be maintained to recover back the purchase price paid under a contract of sale without proof of warranty or fraud where, upon delivery of the property, it proves to be utterly valueless, and where an offer to return has been made by the purchaser and refused."

In the case of

Hamrah et al. v. Maloof & Co., 111 N. Y. Supp. 509,

it appeared that plaintiffs had purchased laces from defendant and paid for them. They were subsequently confiscated by the United States for the non-payment of customs duty by the defendant. The lower court gave judgment for the plaintiffs for the return of their money, which was affirmed in the appellate division of the Supreme Court.

If it be contended by defendant that plaintiff should have offered to return the salmon, worthless as it was, the case just cited becomes especially

applicable in view of the fact that the major part of the merchandise was seized by the United States Government and destroyed. In that case the court said:

> "Equally without merit is the suggestion that the plaintiffs are weak in their case because they have not offered to restore the goods to the defendant. The goods were taken from the plaintiffs because of the wrong committed by the defendant in importing these goods without the payment of duties, and the suggestion that the plaintiffs have failed in any equitable consideration is little less than an impertinence."

Furthermore, should it be urged on the part of the defendant that plaintiff appeared as claimant in the condemnation suit first hereinafter more particularly referred to the above case becomes also a pertinent authority.

> "The appellant urges that as the plaintiffs appeared in the proceeding to condemn the goods, and claimed title to them, it is now estopped to rescind the contract and demand the repayment of its money. But we are of the opinion that the rule invoked has no foundation in reason as applied to this case. The government of the United States reaches the goods. They did belong to the plaintiffs as against all the world, subject only to the right of the government to reach them for the nonpayment of duties. The plaintiffs claimed them, notifying the defendant of the claim of the government, and the defendant employed an attorney to defend the goods. How this could operate to estop the plaintiffs to reclaim their money when it was established that the

defendant had failed to pay the duties is not at all clear to us, and we are of the opinion that it is without merit."

In the case of

Page v. Einstein, 52 N. C. (7 Jones) 147,

the plaintiff purchased from the defendant a note which had been paid, however, before the purchase, and the action was instituted to recover the consideration therefor so paid. In affirming judgment for the plaintiff, the court said:

"A recovery in assumpsit can only be effected where there is a total want of consideration, as where the promise is based upon the sale of a horse that is at the time dead. And a payment made of the purchase money upon such a sale, would be money had and received to the use of the party paying, and might be recovered back, irrespective of any question of fraud.

So, we think money paid for a promissory note, satisfied and extinguished, and which, therefore, has no longer any life as an obligation, stands in the same condition. While the seller of an article of personal property, and likewise, as we suppose, of a chose in action, is not held, in the absence of an express promise, to be liable for defect of quality, yet he is liable if it turn out that the article sold, had no existence at the time, or, that it was a nullity by reason of forgery, or, the like. The liability is not in the nature of a warranty, but rests upon the plain principle of justice, that when something is paid for nothing, through ignorance of facts, the law will reinstate the parties by nullifying the whole transaction."

The case of

Tyler v. Bailey, 71 Ill. 34,

was an action to recover the purchase price paid for counterfeit land warrants. In affirming a judgment for the plaintiff the court said:

> "Appellee paid his money to appellants for genuine scrip, and they delivered to him seven tenths of the amount purchased in counterfeit scrip. Thus the consideration failed to that extent, and, on the failure of consideration, an action accrued to him to recover back the money paid for such scrip. Whether or not the officers of the General Land Office were remiss in not sooner having detected the fact that the scrip was spurious, did not change his right of recovery. The action did not grow out of the rejection of the warrants by the government, or their return to appellee, but from the fact that the consideration had failed for which he had paid his money. Had they been genuine, and they had been returned as spurious, all will concede that no right of recovery would have accrued.
>
> In a suit to recover on a total failure of consideration, the measure of damages is, the money paid, with interest from the day of its payment till the time of recovery. This is believed to be a rule without exception. In fact, we do not perceive how any other just rule could be adopted. Appellee has received no benefit from having received these spurious warrants, he has been deprived of the use of his money, and fair dealing would require that he should, at least, recover it back, with legal interest. It then follows that the court below did not err in telling the jury that the measure of damages was the price paid, with legal interest, from the day it was paid."

We have thus referred to these cases not only because of their enunciation of the principles under which this case was presented, but also because of the difficulty experienced in convincing the court below on demurrer to the amended complaint that such an action would lie.

Specification of Errors.

I.

UNDER ANY ASPECT OF THE CASE THE VERDICT OF THE JURY IN PLAINTIFF'S FAVOR BUT LIMITING ITS RECOVERY TO NOMINAL DAMAGES WAS CONTRARY TO THE EVIDENCE AND TO THE COURT'S INSTRUCTIONS (Assignments XX, XXI and XXII).

We may, for the purpose of the argument, assume that the defendant will contend that, inasmuch as the contract required defendant to overhaul the salmon and remove all swells and rusty tins therefrom after which there should be no reclamation, and inasmuch as swells were in several instances afterwards found among the bad salmon, and as plaintiff did not in some instances show what proportion of swells there were at that time, and, furthermore, as plaintiff could not recover for any bad salmon which might be classed as swells thereafter, the jury had no evidence before it from which it could find what damage plaintiff had suffered. Defendant's contention, in effect, is:

> "I removed all swells and rusty tins before delivery, and while it may be true that, for instance, the United States Government chemist

found, exclusive of swells, 39% of a large portion of the salmon inedible and worthless at the time it left Alaska, yet inasmuch as a few swells developed after delivery, therefore you are entitled to nothing, because you didn't prove how many swells there were."

Such a contention ignores the following:

(1) The importation of the salmon was contrary to law and, being a contraband article, furnished no consideration for the purchase price paid by plaintiff therefor, no matter what may be the technical construction of the contract as to the defendant's non-liability for swells. The testimony is uncontradicted that a substantial part of the salmon was inedible when delivered to plaintiff.

(2) The verdict of the jury, in effect, finds that inedible salmon was delivered to plaintiff but under the court's instruction the jury declares it can not find how much of the damaged salmon was swells and how much was otherwise. The verdict, however, ignores the uncontradicted testimony produced by defendant and the averment in its answer that all swells were removed at the warehouse before the salmon was delivered to plaintiff.

(3) The verdict of the jury, even under the court's instruction, ignores the uncontrovertible testimony of several witnesses, to the effect that a substantial part of the salmon, notably the 2100 cases stored in the Mission Rock Warehouse, was inedible, leaving the swells out of calculation altogether.

(4) The verdict of the jury, even under the court's instruction, ignores the uncontradicted testimony of several expert witnesses that the salmon found inedible by plaintiff and its vendees must have been in that condition when re-processed, and hence was spoiled before it left the canneries.

The question which the jury was preliminarily called upon to decide was, in the language of the Supreme Court of this State, in the case of

Sutro et al. v. Rhodes, 92 Cal. 117,

"Did the plaintiff get what it intended to buy and did buy?"

or

"did it get what it bargained for?"

Bank of Commerce v. Ruffin, (Mo.) 175 S. W. 303.

The salmon was virtually wholly spoiled and was a contraband article of commerce at the time it reached San Francisco in October, 1912, and was not entitled either to be landed here under the *Pure Food and Drug Act of Congress,* approved June 30, 1906,

Chap. 3915 Fed. Stats. Ann. Supp. 1909, p. 135, Secs. 1, 2 and 7, Subs. 5 and 6,

or to become an article of trade or commerce in this State under the Act entitled, "*An Act for preventing the manufacture, sale or transportation of adulterated, mislabeled or misbranded foods and liquors and regulating traffic therein, providing penalties therein, establishing a state laboratory for foods, liquors and drugs, and making appropriation therefor*", approved March 11, 1907.

Stats. of 1911, p. 208.

The Pure Food and Drug Act of Congress of June 30, 1906, Chapter 3915, provides in Section 2:

"That the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded, within the meaning of this Act, is hereby prohibited; and any person who shall ship or deliver for shipment from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to a foreign country, or who shall receive in any State or Territory or the District of Columbia, from any other State or Territory or the District of Columbia, or foreign country, and having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adulterated or misbranded within the meaning of this Act, or any person who shall sell or offer for sale in the District of Columbia or the Territories of the United States any such adulterated or misbranded foods or drugs, or export or offer to export the same to any foreign country, shall be guilty of a misdemeanor, and for such offense be fined not exceeding two hundred dollars for the first offense, and upon conviction for each subsequent offense not exceeding three hundred dollars or be imprisoned not exceeding one year, or both, in the discretion of the court, *Provided,* That no article shall be deemed misbranded or adulterated within the provisions of this Act when intended for export to any foreign country and prepared or packed according to the specifications or directions of the foreign purchaser when no substance is used in the preparation or packing thereof in conflict with the laws of the foreign country to which said article is intended to be shipped; but if said article shall be in fact sold or offered for sale

> for domestic use or consumption, then this proviso shall not exempt said article from the operation of any of the other provisions of this Act."

Section 4 provides for chemical examinations to be made in the Bureau of Chemistry of the Department of Agriculture, and the giving of a notice of adulteration to the party from whom the sample was obtained, the reporting of the results of the examination to the United States Attorney, and the giving of notice by publication of judgment of condemnation in such manner as may be prescribed by the rules and regulations of the Secretary of the Treasury, the Secretary of Agriculture and the Secretary of Commerce and Labor.

Section 5 provides for the institution of proceedings of condemnation by the United States Attorney.

Section 7 defines what constitutes adulteration, which, in the 6th subdivision thereof, exists:

> "If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter."

Section 10 provides for seizure of any matter prohibited by the Act and for its confiscation by libel of condemnation, and also that property so seized shall, if condemned, be destroyed or otherwise disposed of.

The State Pure Food and Drug Act of March 11, 1907, Chapter 181, provides in section 1 that

> "the manufacture, production, preparation, compounding, packing, selling, offering for sale or keeping for sale within the State of California, or the introduction into this state from any other state, territory, or the District of Columbia, or from any foreign country, of any article of food or liquor which is adulterated, mislabeled or misbranded within the meaning of this act is hereby prohibited. Any person, firm, company, or corporation who shall import or receive from any other state or territory or the District of Columbia, or from any foreign country, or who having so received shall deliver for pay or otherwise, or offer to deliver to any other person, any article of food or liquor adulterated, mislabeled or misbranded within the meaning of this act, or any person who shall manufacture or produce, prepare or compound, or pack or sell, or offer for sale, or keep for sale, in the State of California any such adulterated, mislabeled or misbranded food, or liquor shall be guilty of a misdemeanor; *provided* that no article of food shall be deemed adulterated, mislabeled or misbranded within the provisions of this act, when prepared for export beyond the jurisdiction of the United States and prepared or packed according to specifications or directions of the foreign purchaser, when no substance is used in the preparation or packing thereof in conflict with the laws of the foreign country to which said article is intended to be shipped; but if such foods shall be in fact sold, or kept or offered for sale for domestic uses and consumption, then this proviso shall not exempt said article from the operation of any provisions of this act."

There is in this Act a definition of adulteration similar to that contained in the Federal Act.

It is provided in Section 8 that the possession of any adulterated food by any manufacturer, purchaser, jobber, packer or dealer in food, or broker, commission merchant, agent, employee or servant of any such manufacturer, producer, jobber, packer or dealer, is *prima facie* evidence of the violation of the Act.

The Act further, in Section 9, establishes a state laboratory for the analysis and examination of food and drugs under the supervision of the State Board of Health, and provides for the appointment of a director and an assistant, etc.; and in

Section 10 it provides for examinations and analyses of food, etc.

Provision is made in Section 16 for the notice of adulteration to be sent to parties furnishing samples and of the hearings to follow; and

Section 19 specifies what the duty of the District Attorney is in the premises.

These acts must be taken into consideration in construing the contract, and if any part of the latter contravenes any prohibitory or penal provision of either of these laws, the contract in that respect must fall.

> "The settled law of the land at the time a contract is made becomes a part of it and must be read into it."
>
> *Weinreich Estate Co. v. A. J. Johnston Co.*,
> 21 Cal. App. Dec. 150, 152;

Spencer et al. v. Houghton, 68 Cal. 82, 90;
Stohr v. S. F. Musical Fund Society, 82 Id. 557, 560;
Deweese v. Smith et al., (C. C. A.) 106 Fed. 438, 442.

"The rule is that all laws in existence when an agreement is made, necessarily enter into, and form a part of, it, as fully as if they were expressly referred to and incorporated into its terms."

Armour Packing Co. v. U. S., (C. C. A.) 153 Fed. 119.

The general rule respecting the illegality of a contract penalized by law, or, we may add, the attempted performance in an illegal manner of an otherwise valid contract, was laid down at an early date by Lord Holt in the case of

Bartlett v. Binor, Carth. 252,

as follows:

"That every contract made for or about any matter or thing which is prohibited and made unlawful by any statute is a void contract, though the statute itself doth not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitory words in the statute."

The *Civil Code of California,* Section 1667, provides:

"That is not lawful which is:
1. Contrary to an express provision of law;
2. Contrary to the policy of express law, though not expressly prohibited; or
3. Otherwise contrary to good morals."

Said Judge Henshaw of the Supreme Court of California in delivering the opinion of that court in the case of

Levinson v. Boas, 150 Cal. 185, 193:

> "It is to be noticed that every case from every court recognizes that when a statute has been made for the protection of the public, a contract" (or, we may add, an attempted performance of a contract) "in violation of its provisions is void."

That a sale prohibited by law is void is further sustained by the following authorities:

Benjamin on Sales, (Bennett's 7th Am. Ed.) 517;

Williston on Sales, Secs. 669, 680;

Page on Contracts, Secs. 329 et seq.;

Miller v. Ammon, 145 U. S. 421; 36 L. Ed. 759;

Church v. Knowles, (Me.) 63 Atl. 1042;

Florence Cotton Oil Co. v. Anglin, (Ark.) 152 S. W. 295; 43 L. R. A. (N. S.) 1109 and note;

Church et al. v. Proctor, (C. C. A.) *post;*

McConnell v. Kitchens, (S. C.) 47 Am. Rep. 845;

Berka v. Woodward, 125 Cal. 119, 127;

Savings Bank of San Diego County v. Burns, 104 Cal. 473.

The rule is well illustrated by the so-called "fertilizer cases" some of which have been just cited. A number of southern states have statutes prohibiting the sale of fertilizer without an inspection

and mark by the state officials, and these cases hold that an action for the purchase price of such uninspected or unmarked fertilizer can not be maintained and that a note given for such purchase price is void. It can not be said that the executory contract of sale itself is illegal in these cases for in none of them is it said that the parties contracted for the sale of uninspected fertilizer; on the contrary, the executory contract for the sale of fertilizer was legal and valid but when the vendor in performance of such valid executory contract furnished uninspected and unmarked fertilizer, such performance was illegal and could not be made the basis of an action.

McConnell v. Kitchens, supra;
Allen v. Pearce, (Ga.) 10 S. E. 1015;
Van Meter v. Spurrier, (Ky.) 21 S. W. 337;
Baker v. Burton, 31 Fed. 401;
Florence Cotton Oil Co. v. Anglin, supra.

Our Supreme Court in the case of

Berka v. Woodward, supra,

said:

> "The courts refuse all relief to one who asks compensation for the doing of an act which is conclusively presumed to be hurtful to public interests or morals * * *. The rule, further, is that where a statute pronounces a penalty for an act, a contract founded on such act is void, although the statute does not pronounce it void, nor expressly prohibit it."

It is patent that if a contract of that character is void, an act denounced by such a statute is equally

void, though performed ostensibly in pursuance of a valid contract.

In the case of

Savings Bank of San Diego County v. Burns, supra,

the court held (quoting from the syllabus):

> "The general rule is that a contract founded upon an illegal consideration or prohibited by statute is void; but there are exceptions to this rule, where the parties are not in *pari delicto,* and where a class of contracts is prohibited by statute for the protection of particular parties thereto, the adverse parties cannot take advantage of the illegality of such contracts."

Now when the contract in question, which calls for an article of human consumption, was entered into in this state, there were these two Pure Food Acts in existence, virtually identical as far as we are concerned, and which, we may here parenthetically remark, may coexist and be equally effective,

Crossman v. Lurman, 192 U. S. 189, 49 L. Ed. 401, affirming the New York Court of Appeals decision, s. c. 83 N. E. 1077,

whereby the introduction into and sale in this state of articles of food adulterated within the meaning of each of these acts, that is, in the filthy condition in which the salmon was proved to be, are prohibited and made a criminal offense; and food so adulterated is subject to condemnation and destruction.

Said the Circuit Court of Appeals for the First Circuit, in the case of

Church et al. v. Proctor, 66 Fed. 240, 243 *et seq.,*

where the conditions were reversed and the plaintiff in the court below (Proctor), in seeking the enforcement of a contract for the purchase and delivery of fish, was charged with the violation of a state statute:

> "As bearing upon the general question whether Proctor's purpose and manner of doing business was such as to render the contract void as against public policy, we think the Rhode Island statute might properly be urged, and that it was material to know whether Proctor's manner of doing business conformed to the statute, or whether it was in plain violation of a statute intended to protect the public generally against fraud and imposition. * * * It is manifest that this statute regulating the packing of fish in Rhode Island was intended for the protection of the public generally, not Rhode Island consumers alone, but consumers generally. It was to prevent fraud upon the public, and public policy requires that no action shall be successfully maintained in favor of those who pack and ship food fish in open violation of the wholesome provisions of this statute. It is conceded that the plaintiff below not only did not conform to the statute, but that the packages were falsely marked. The maxim, '*Ex dolo malo non oritur actio,*' fairly and forcibly applies to such a situation. If, upon a jury trial, the fact should be established that the packages prepared and shipped by Proctor were pickled fish, within the meaning of the Rhode Island statute, then for such time as he was actually engaged, or had the

purpose to engage, in packing and shipping pickled fish, without conforming to the provisions of the statute, he would not be entitled to maintain his action for damages resulting from nondelivery of the subject-matter intended to be used in violation of the statute law" (citing a number of authorities).

"Looking at the transaction aside from the local statute, and independent of the question whether the packages contained pickled or salted fish, the authorities conform to a wholesome and sound rule of public policy that no cause of action shall arise in behalf of a person engaged in a business which is illegal, or which is a fraud and imposition upon the public, and the law will not uphold or enforce a contract, or aid a party, where the purpose is to cheat and deceive the public generally. We feel bound to recognize the modern public policy indicated by the various statutes, as sustained by judicial authority, designed for the protection of the public, and which, in the interest of health and fair dealing undertake to regulate traffic in food products. The point is taken that the purpose of Proctor to place this product (innocent of itself) upon the market in an improper manner was not known to Church & Co. at the time of the alleged breach, and that, therefore, the objection is not open to the defense. This is not an answer. The defense of public policy does not proceed so much upon the idea of relief to the defendant as protection to the public, by withholding legal remedy from a party contemplating or practicing imposition. It would be a strange rule of law which would extend relief to a *particeps criminis,* and withhold relief from an innocent party, who seeks to avail himself of its protection when the imposition is discovered" (citing authorities). * * *

> "Humanity is entitled to know what it buys and consumes. Government is instituted and maintained, and law is administered, for the protection of the people; and justice influenced by enlightened public policy, and controlled by legal principles, requires that contracts shall not be upheld and enforced for the benefit of a wrongdoer, where the subject-matter thereof is designed to be used in furtherance of a business enterprise which contemplates imposition upon the general public through false, misleading, and deceptive brands and labels, placed upon sealed packages of food products in a manner calculated to deceive, and forward the sale of such articles for what they are not."

It follows that as defendant was forbidden to supply in fulfillment of the contract and to sell this spoiled salmon, which was subject to official condemnation and destruction, the sale thus prohibited by laws which were passed for the protection of the public was void, and, therefore, defendant received the money paid to it by plaintiff without any consideration therefor.

The jury found, as it could not otherwise have done, in favor of the plaintiff, and thereby established that under the issues framed by the pleadings there had been a failure of consideration on defendant's part for the purchase price of the salmon, and it also found under the court's instructions (Trans. pp. 169-171, 174) that defendant had breached the contract made with plaintiff by delivering to the latter salmon which was unfit for human consumption; for the court charged the jury that it was defendant's duty to deliver salmon that was fit for

human consumption "since the pure food law of the United States forbids the sale for that purpose of decomposed or adulterated food" (Trans. pp. 168, 169). We may be sure that the nominal amount of the verdict was due to the instruction, technically accurate in the abstract but not here applicable, that

> "If it [plaintiff] has satisfied you that there has been a breach of this contract, it must furnish you a reasonable basis upon which you can, without speculation, without going out into the realms of conjecture, find with reasonable certainty the damage that it has suffered; but if the plaintiff fails to furnish a [the] jury with that degree of evidence, then, although it may appear that it is entitled to recover, the jury are at liberty to render a verdict for nominal damages, as I suggested the other day, of one dollar or any other insignificant sum" (Trans. p. 174).

We contend that the jury was furnished with such "reasonable basis" and that inasmuch as the evidence conclusively shows that a large part of the salmon in question was spoiled prior to the time when it was delivered to plaintiff so as to make it commercially worthless, the only verdict which could have been rendered by the jury was one in favor of the plaintiff for at least the full amount of the purchase price paid by it; for defendant could not legally sell to plaintiff any food that was unfit for human consumption.

Said the Supreme Court of Pennsylvania, in the case of

Catani v. Swift & Co., 95 Atl. 931,

quoting with approval from the cases of

Ketterer v. Armour & Co., 200 Fed. 322, and *Elkins, Bly & Co. v. McKeon,* 79 Pa. St. 493, 502,

"Where a state statute provides that there shall be an implied contract that food sold shall be fit for household consumption, recovery may be had from the packer without proving that he knew the food was unwholesome and the packer is liable to the ultimate consumer of the diseased food."

See further

U. S. v. Sprague, post;

U. S. v. 13 Cases of Frozen Eggs, (C. C. A.) 215 Fed. 584.

Plaintiff itself would have been liable for damages to any injured person if it had allowed this spoiled salmon to be sold for consumption after learning of its true condition.

Ward v. Morehead City Sea Food Co., (N. C.) 87 S. E. 958.

As we have before said, the contract itself was perfectly lawful. It was the performance thereunder that was unlawful. Nothing in the contract contemplated a violation of any law, particularly the laws relating to pure food.

The verdict of the jury, in so far as it only awards a nominal amount of damages to plaintiff is also against the evidence and the court's instruction relating to the removal of swells and rusty tins

from the shipment. The court instructed the jury, in part (Trans. pp. 167, 168):

> "The contract, so far as it relates to the goods in controversy, provides that the shipment was to be overhauled by defendant, the seller, at San Francisco, and all swells and rusty tins were to be taken therefrom, after which 'no reclamation of any nature will be allowed'; and that plaintiff was to have the privilege of inspecting the salmon before taking delivery; and it further guarantees that the salmon shall 'be equal to the 1911 pack,' as expressed.
>
> The provision that after the removal of the swells and rusty tins 'no reclamation of any nature will be allowed' must be understood, in view of the nature of the goods involved and the other provisions of the contract referred to, as meaning that after such removal no reclamation could be had for defects of the character specified, that is, such defects as may usually be ascertained by external inspection at the time of the tins or containers. In other words, while no recovery may be had by the plaintiff for loss suffered through swells or rusty tins developing after such inspection and removal, the provision does not mean that reclamation may not be had for defects, if they existed at the date of delivery, that could not be so discovered or detected, which either rendered the goods unfit for the purpose for which it was dealt in by the parties, or made it of a quality below that of the pack of 1911; otherwise, the provision guaranteeing the fish to be equal to the pack of 1911 would have no effect."

It must be admitted that this instruction is not altogether a clear interpretation of the contract especially in view of the legal prohibition against

the importation and sale of inedible food. Assuming, however, that it is free from objection, it laid down a method for determining a basis for the recovery which the jury apparently failed to apply to the established facts of the case; for, as we have heretofore shown, it was alleged in the answer that on the arrival of the salmon in San Francisco defendant overhauled it and removed therefrom all swells and rusty tins (Trans. p. 30), and one of its foremen testified (Trans. p. 158) that in the fall of 1912, he overhauled this salmon at Mission Rock Warehouse and separated from the bulk of it the rusty tins and swells and light cans. It was further shown that thereafter and just before delivery 190 cases of damaged salmon, each case containing 48 tins, were thrown or dumped overboard from the warehouse (Trans. pp. 150, 151). Hence, according to the allegations of the answer and uncontradicted testimony offered by defendant, all of the swells then existing had been removed from the goods in question; and yet the testimony uncontradictedly shows that at that very time, to wit, the date of its delivery a large part of the salmon still remained unfit for human consumption in a greater or less state of decomposition, which was undiscoverable by external inspection, and which rendered the merchandise as a whole worthless and far inferior in quality to the pack of 1911. Hence, under the court's instruction the jury was left no alternative but to find that at the time the salmon was delivered by defendant none of the damage was discoverable by

external inspection and that plaintiff was entitled to recover the full purchase price thereof.

Even if this instruction to the jury could be so construed as to mean that there could be no recovery by plaintiff for swells developing after the salmon had been delivered, but whose presence at such time was not discoverable by external inspection, nevertheless the nominal amount of the jury's verdict was still unjustified, for it was shown on behalf of the plaintiff uncontradictedly that not long after the salmon had been delivered, 30, 39, 60 per cent (according to various witnesses who made the examination), of 2100 cases of salmon stored in the Mission Rock Warehouse in San Francisco was unfit for consumption, judging merely from organoleptic tests, which percentage would have been increased very considerably had a bacteriological examination been made of the salmon, eliminating from consideration all swells and rusty tins, except one which found its way into the shipment to the U. S. Laboratory at Seattle (Trans. pp. 51, 52, 70, 73, 81, 82, 85-88, 132, 133). 2100 cases of salmon so honeycombed with rottenness as to be practically worthless, not a can of which could have been sold without endangering human life, figured at 85¢ a dozen cans, i. e., $3.40 a case, the purchase price, amounts to the sum of $7140; or at $1 a dozen cans, i. e., $4 a case, the market price of the salmon at that time, had it conformed to the 1911 pack (Trans. p. 56), these 2100 cases of warehouse salmon would have been worth $8400. Here,

then, were definite figures furnishing a "reasonable basis" upon which the jury could and should have based a verdict for a substantial amount, even if plaintiff, under its contract, was obliged to stand the loss of the abnormal quantity of rotten salmon which could not be detected by external examination at the time the goods were delivered to it in San Francisco, and which thereafter developed into swells.

Again, the verdict of the jury was plainly against the evidence and the court's further instructions to the jury, reading as follows:

> "There is no controversy over the fact that the purpose for which the salmon was sold was for human consumption. It was, therefore, the duty of the defendant, under the terms of the contract, and the law as well, to deliver to plaintiff salmon which was, at the time of its delivery, substantially capable, taking and regarding the shipment as a whole, of being used for such purpose, since the Pure Food Law of the United States forbids the sale for that purpose of decomposed and adulterated food. Therefore, should you find that the salmon was not at the time of its delivery, substantially of a character, that is, over and above the percentage of defective cans usually found in goods of the character of those involved, in condition, taking the shipment as a whole, of being used for human consumption, and that plaintiff did not know and could not have ascertained at the time it took delivery that such was its condition, except by opening the cans and thereby destroying its marketable quality, plaintiff is not precluded from recovery for such defects, and your verdict should be in its favor for the difference between the market

value which the salmon would have had at the time of its delivery to plaintiff, had it been of the quality called for, and its actual value as delivered" (Trans. pp. 168, 169).

It is further against the evidence and the following instruction of the court:

"And, should you find that the salmon as a whole or an entirety, by reason of its spoiled condition at the time of delivery, had no real value as a merchantable commodity, there would be an entire failure of consideration, and in that event you should return a verdict in favor of plaintiff for the amount paid by it to the defendant for the salmon which it is admitted was $16,961.30, together with interest on $9,821.30 thereof from the 18th day of November, 1912, and on $7,140 thereof from the 26th day of November, 1912, the respective dates of payment, to the present time, at the rate of 7 per cent per annum" (Trans. p. 169).

The verdict, also, is contrary to the evidence and to the following instruction of the court:

"But if you find that the salmon was not, at the time of its delivery, substantially equal in quality and condition with that of 1911, defendant has not fulfilled its guarantee, and plaintiff will be entitled to a verdict for the excess, if any, of market value which the salmon would have had at the date of delivery had the warranty been complied with, over its actual market value at that time in the condition in which it was delivered" (Trans. p. 170).

And also:

"Should you find that the salmon was, either as a whole or to any substantial extent over and above the usual percentage of spoiled or defective cans, unfit for human consumption

at the time of its delivery, ignorance of such fact by defendant would not excuse it from fulfilling its contract to deliver salmon of the character stipulated'' (Trans. p. 170).

This brings us to a consideration of the contract, and the correctness of the construction put upon it by the trial court is challenged by our further specification of error that

II.

THE TRIAL COURT ERRED IN FAILING TO CHARGE THE JURY UNEQUIVOCALLY, IN EFFECT, AS REQUESTED BY PLAINTIFF IN ERROR, THAT IT WAS ENTITLED TO RECOVER THE PURCHASE PRICE OF WHATEVER INEDIBLE SALMON DEFENDANT HAD DELIVERED TO IT REGARDLESS OF THE EXISTENCE OF SWELLS (Assignments VII, XI, XV, XVII and XVIII).

The trial court allowed an exception to each instruction which the court declined to give in the form and as requested by plaintiff (Trans. p. 176), apparently satisfied that its attention had been sufficiently called thereto without the necessity of further particularity; and for brevity of discussion we group under one head these requested instructions on different phases of one subject. They are as follows:

"VII.

It is admitted here by the pleadings that the salmon in question was packed in the Territory of Alaska and thereafter introduced into, and delivered to the plaintiff for compensation in, the State of California.

Now the Federal Food and Drug Act of June 30, 1906, provides, as far as we are here

concerned, that the introduction into any state or territory from any other state or territory of any article of food which is adulterated within the meaning of the act is prohibited; and any person who shall so ship, or deliver for shipment, any such article so adulterated, shall be guilty of a misdemeanor.

The Food and Drug Act of the State of California of March 11, 1907, also provides that the introduction into this state from any other state or territory, and the sale in this state of any article of food which is adulterated within the meaning of the act is prohibited; and that any person who shall so import or receive any such article so adulterated, or who having so received in this state shall deliver for pay, or otherwise, any such article so adulterated shall be guilty of a misdemeanor.

Each of such acts further provides that food is adulterated within the meaning of the law if it consists in whole or in part of a filthy, decomposed or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not.

It is not necessary that the adulteration be injurious to health to bring it within the inhibition of the act. Nor is it necessary that the adulteration be added by the hand of man. It is sufficient, in the eye of the law if it be added by nature.

VIII.

It is a rule of law 'that all laws in existence when an agreement is made necessarily enter into, and form a part of it, as fully as if they were expressly referred to and incorporated into its terms.' Hence the Pure Food and Drugs Act, to which I have just referred, are to be deemed a part of the contract entered into between the parties, and this contract must be considered as containing an express

provision against the delivery of salmon which is adulterated within the meaning of that act.

IX.

If you shall find that the salmon in question when the cans were opened, was so badly, or otherwise, decomposed, as to be unfit for human consumption you are entitled to believe and find that, at the time the salmon was brought into this port by the defendant and delivered to the plaintiff, the food was adulterated, within the meaning of the law, and its importation and delivery here was, therefore prohibited.

X.

The laws to which I have referred were passed for the protection of the public, including the plaintiff; and if you shall find that a substantial part of the salmon was decomposed, or in process of decomposition, or contained germs or bacteria that produced decomposition at the time that it was brought to San Francisco by defendant and delivered to plaintiff, that its sale was void and plaintiff is entitled to a verdict for the amount paid by it for the salmon, which, it is agreed, amounted to $16,-961.30, with interest on $9821.30 thereof from the 18th day of November, 1912, and on $7140 thereof from the 26th day of November, 1912, to the present time, at the rate of 7% per annum.

XI.

If you shall find that a substantial part of the salmon in question was decomposed, or in process of decomposition, or contained germs or bacteria which produced decomposition at the time it was brought to San Francisco by defendant, and delivered to plaintiff, and if you shall find further that plaintiff received this salmon in ignorance of its true condition and relying upon its fitness for human consumption, then plaintiff is entitled to a verdict for the amount paid by it for the salmon, which

it is agreed amounted to $16,961.30, with interest on $9821.30 thereof from the 18th day of November, 1912, and on $7140 thereof from the 26th day of November, 1912, to the present time, at the rate of 7% per annum.

XV.

The contract made between the parties to the suit provided, among other things, that the 'Archer' brand of salmon was to be overhauled in San Francisco by the defendant and all swells and rusty tins were to be taken therefrom, after which no reclamation of any nature was to be allowed, as far as swells and rusty tins were concerned; but the contract did not and could not, in view of the Pure Food Acts of Congress and of the Legislature of this state, provide that the purchaser, who is the plaintiff, could be compelled to accept salmon which was adulterated within the meaning of those acts, even if plaintiff did not inspect the salmon before taking delivery.

XVII.

I further charge you that by the contract in suit defendant warranted that the 'Archer' brand salmon therein described should be equal to the 1911 pack of the same brand of salmon. It is admitted that the 1911 pack was edible and fit for human consumption. If you shall find that the salmon delivered to the plaintiff in 1912 was not substantially equal to the 1911 pack of the 'Archer' brand salmon, then defendant has failed to comply with the contract and plaintiff is entitled to recover the excess, if any, of the value which the salmon would have had at the time to which the warranty referred, i. e., at the time of delivery, if the warranty had been complied with, over the actual value of the salmon at that time.

XVIII.

You are not concerned with the determination of the question as to whether or no a do-over salmon, as the term is commonly understood and used in the canned salmon trade, is an article of commerce that must be treated with suspicion. The contract under which the salmon in controversy was purchased warranted that this salmon, no matter what the general character or reputation of do-over salmon had been, would conform to a certain standard, that is, would be equal to the pack of the same brand of the year before, which was admittedly suitable for human consumption.

You are, therefore, only concerned with the determination of the question: Was the Archer brand pack of 1912 delivered to plaintiff by defendant equal in quality to the Archer brand pack of 1911; that is, was the salmon delivered by defendant to plaintiff in the fall of 1912 suitable for human consumption?''

We have already shown that the contract in question must be construed in the light of the law bearing upon the same subject-matter, and that in view of the penal and prohibitory character of these laws any provision of the contract inconsistent therewith must fall. Eliminating, however, for the present any reference to the Pure Food Acts, it is apparent that this contract, inartificially drawn, is not entirely free from ambiguity in several respects. It provides against any reclamation for swells and rusty tins—(rusty tins are only objectionable as indicating the later probability of holes which produce swells by admission of air to the inside of the cans and may be the result

of improper lacquering)—followed later by a guarantee that the salmon shall equal the 1911 pack, in character and quality of course. In other words, if the 1912 pack was equal to the 1911 pack, the purchaser was not entitled to any reclamation for swells and rusty tins; and these must then be discoverable by external inspection, as otherwise the privilege of inspection before delivery given to plaintiff would be idle.

The circumstances under which the contract was made should be taken into consideration in reaching the intention of the parties to it.

Stanley v. Green et al., 12 Cal. 148;

and a contract will be so construed, if possible, as will

> "not impute to the parties an intention to violate the law. Presumptions of the law are in favor of the good faith of all parties to a business transaction, and, if the language of a contract is fairly susceptible of a construction or explanation which renders it valid and enforceable, according to its terms, such construction will be adopted *in preference to one which brands it with illegality, and makes it possible for one to repudiate the performance of his promise, while demanding full payment of the consideration to be given therefor*" (italics ours).
>
> *6 Ruling Case Law, "Contracts",* Sec. 229.

Or, as the Supreme Court of Colorado observed:

> "Where an instrument is susceptible of two constructions—the one working injustice and the other consistent with the right of the case—

that one should be favored which upholds the right."

Wyatt v. Larimer and Weld Irrig. Co., 36 A. S. R. 280, 288.

But counsel for defendant in error will undoubtedly contend that the contract is not susceptible to two constructions; that it means, in effect, that defendant can deliver thereunder merchandise prohibited by law, if plaintiff does not discover the imposition before delivery—not that the contract specifically says so, but because of the general language employed. The Supreme Court of Georgia, however, said that it was not to be presumed that people intend to violate the law, and that the language of their undertaking must, if possible, be so construed as to make the obligation one which the law would recognize as valid.

Equitable Loan & Security Co. et al. v. Waring, 62 L. R. A. 93;

See further,

Hubbard v. Miller, (Mich.) 15 Am. Rep. 153, 160.

A court will act

"upon the presumption that both buyer and seller are acting honestly and with no intention to cheat or defraud, and, as 'the purchaser cannot be suffered to buy goods to lay them on a dunghill * * *' it will not be assumed that the seller desires to obtain money for a worthless article".

Hall Furniture Co. v. Crane Breed Mfg. Co. et al., (N. C.) 57 L. R. A. (N. S.) 428, 429.

The parties, then, in view of their prior course of dealings with each other, apparently assumed that the amount of such swells would correspond, generally, with those found in shipments of earlier years,—the 1911 pack contained only one-half of one per cent of spoiled salmon, and Hume, the well known canner, said "one per cent would be excessive" (Trans. p. 80),—and therefore agreed that there would be no reclamation for any such negligible amount of defective salmon; but that in order to prevent even this loss the buyer was privileged to see that the swells were removed before taking delivery; and as the inspection was, by reason of the character of the goods, naturally an external one only, it was only cans which then gave external evidence of their inedibility that came within the inhibition of the contract against subsequent reclamation.

The warranty that the salmon would equal the 1911 pack is an integral part of the contract and any other clauses therein, particularly those preceding it, must be read in connection with it. It would be quite ridiculous for the parties to provide that the salmon would equal the 1911 pack, an admittedly edible salmon, and then provide that the seller could deliver rotten salmon with no redress on the part of the buyer.

Apparently what was in the court's mind in instructing the jury (Trans. p. 168) was that swells existing at the date of delivery, and therefore discoverable by external inspection, and which were

not removed by the seller, were not a subject for reclamation, no matter what might be their quantity, nor was the purchaser entitled to reclamation for swells so discoverable which developed after delivery, but that the buyer was entitled to reclamation for all swells that developed after it took delivery of the goods if they existed at the date of delivery but could not be discovered by external inspection. Now the court's instruction ignores the testimony of several impartial witnesses to a fact which was not controverted (Trans. pp. 71, 72, 87, 88, 91, 134) and the testimony of one of defendant's witnesses (Trans. pp. 153, 155) that *swells developing either before or after delivery commenced at the cannery shortly after the re-processing of the salmon,* by reason of the decomposition of the fish, and developed either slowly or rapidly, depending upon the condition of the can, the extent of vacuum in it, or the completeness of the sterilization of the tins, and may have developed to such an extent as to be noticeable to the eye when the salmon reached San Francisco or they may have developed so slowly as to escape the ordinary observation at that time; but whether the salmon was decomposing rapidly or slowly, *the bacteriological action had set in almost immediately after the re-processing* and it had then become adulterated and inedible within the meaning of the Pure Food Acts above referred to, for at that time the chemical action had started that made the salmon, even before it was placed in the hands of the consumer, unfit for use as food.

Said the Circuit Court of Appeals in the case of

U. S. v. 443 Cans of Frozen Egg Product, 193 Fed. 589, 594,

which was subsequently reversed only on the question of the jurisdiction of the appellate court:

> Where a "frozen product is so near decomposition that exact chemical and thermal precautions are necessary to prevent decomposition, then the product is, as an article of food, so close to the danger line as to excite suspicion and demand the closest judicial scrutiny, before it is allowed to become an article of food consumption * * *. The condition of a product in the hands of a consumer is the place and time to test its fitness for food."

In that case ten per cent of sugar was added to the egg product so as to prevent the deterioration of the egg when frozen; but when the frozen product was melted the sugar tended to hasten the decomposition. The court held that although decomposition had not really set in until the product was being melted for use as food, nevertheless it was adulterated within the meaning of the Federal Act and contraband when prepared, before its use as food.

Said the court in the case of

U. S. v. Sprague et al., 208 Fed. 419:

> "A substance containing bacilli liable to cause disease, to such an extent as to make it dangerous for food purposes, is certainly 'filthy' under the meaning of that word as generally used, and especially since the result of investigation has shown that filth or dirtiness is dangerous through the germs which it contains, and not solely because of offense to the senses."

It was there held that the term "adulterated" as used in the Act is not restricted to an addition by the hand of man, but includes any substance which has been added by nature and is contained in the article to be shipped.

In the case of

U. S. v. 200 Cases of Adulterated Tomato Catsup, 211 Fed. 790,

Judge Bean of Portland, in reviewing and following the evidence of various witnesses including that of Dr. Schneider of the University of California, one of plaintiff's witnesses here, held that the presence of bacteria so as to make an article unfit for food brings it within the letter and spirit of the law, and that, to bring it within the inhibition of the statute, it is not necessary to show that the product in question would be injurious to health. Decomposition may be either "in part or in whole".

The requested instruction accurately stated the proper construction and effect to be given to the contract.

III.

WE FURTHER SPECIFY AS ERROR THE ACTION OF THE TRIAL COURT IN REFUSING TO CHARGE THE JURY, IN SUBSTANCE, THAT THE SELLER WAS BOUND TO FURNISH AN ARTICLE THAT WAS CAPABLE OF BEING USED, EVEN THOUGH IT EXPRESSLY REFUSES TO WARRANT ITS CONDITION AND GIVES THE PURCHASER AN OPPORTUNITY OF INSPECTING IT (Assignment XIV).

This proposed instruction reads as follows:

"You are further instructed that when anyone sells an article of any kind, 'Although there is no implied warranty as to quality in the sale of personal property, the seller is held to the duty of furnishing property, in compliance with the contract of sale, that is at least merchantable or salable, and to this we may add that it shall be capable of being used, if intended for use, even although the seller expressly refuses to warrant the condition of the article and gives the purchaser an opportunity of inspecting it.'

This is especially true in view of the state and federal Pure Food Acts. This rule rests 'upon the presumption that both buyer and seller are acting honestly and with no intention to cheat or defraud,' and, as 'the purchaser cannot be supposed to buy goods to lay them on a dung hill, * * * it will not be assumed that the seller desires to obtain money for a worthless article. * * *' So, that, upon this issue, after considering all the evidence, if you find therefrom that the salmon received by the plaintiff was worthless and unfit for the purpose for which it was purchased and was incapable of being used for human consumption, it will be your duty to return a verdict for the plaintiff for the amount paid for his salmon, with interest to the present time."

This is particularly true in the case at bar. External inspection would yield but little, if any, information. Each can must be opened to determine the condition of its contents and when opened under such circumstances it ceases to be of use. Not only is a warranty of the edibility of the salmon implied in the Federal and State Acts, *supra,* but it has been held that even if one refuses to warrant the condition of any article sold and

advises the purchaser to see it, nevertheless the seller is bound to furnish an article which is capable, not necessarily of coming up to the purchaser's expectation, but at least of being put to *some* use; for as stated by Lord Ellenborough in the case of

> *Gardner v. Gray,* 4 Campbell 144, 16 Rev. Rep. 764,
>
> "The purchaser cannot be supposed to buy goods to lay them on a dung hill."

This is particularly true of food sold in hermetically sealed containers.

In the case of

> *Hall Furniture Co. v. Crane Breed Mfg. Co. et al., supra,*

the court held that a person who sold a second-hand article that was not fit for any use as such (quoting from the syllabus),

> "cannot retain the purchase price, although he expressly refuses to warrant its condition, and advised the purchaser to see it, since he was bound to furnish an article capable of being used".

Hence if the article in question was unfit for food, which was the only way it could have been used, and was the object for which it was purchased, and if it can only be consigned to a "dung hill", the implied warranty in the contract is broken and recovery can be had for the purchase price, regardless of the guaranty contained in the contract

that the fish would be equal to the fish of a previous pack, i. e., that it would be edible and merchantable.

IV.

WE FURTHER SPECIFY AS ERROR THE ACTION OF THE TRIAL COURT IN REFUSING TO ADMIT IN EVIDENCE THE ORIGINAL JUDGMENT ROLL IN THE CASE OF UNITED STATES OF AMERICA V. TWENTY-ONE HUNDRED CASES OF CANNED SALMON, AND THE CERTIFIED COPIES, RESPECTIVELY, OF THE JUDGMENT ROLLS IN THE CASES OF UNITED STATES OF AMERICA V. THREE HUNDRED CASES OF SALMON; UNITED STATES V. TWENTY-FOUR CASES MORE OR LESS CONTAINING FOUR DOZEN CANS EACH; UNITED STATES OF AMERICA V. SEVENTY-FIVE CASES MORE OR LESS OF CANNED SALMON; AND UNITED STATES OF AMERICA V. TWENTY-EIGHT CASES MORE OR LESS OF ARCHER BRAND SALMON (Assignments II-VI).

In the suit first mentioned the court decreed condemnation of the salmon in Mission Rock Warehouse for the reason that when shipped from Alaska to San Francisco it was adulterated under the provision of section 7, paragraph 6 of the Pure Food and Drug Act of Congress, approved June 30, 1906, in that the contents of these cases of salmon consisted in whole or in part of a filthy, decomposed, putrid animal or vegetable substance (Trans. pp. 112, 99), and the salmon was destroyed by the United States Marshal. In the other cases above mentioned different portions of the salmon sent to various eastern places were condemned at different times because putrid and decomposed when imported into these different states.

The court rejected this documentary evidence apparently on the ground that the defendant was not specifically made a party to each of these proceedings. The monition, however, that was published in each case was a notice to the world of the pendency of these suits. No question was raised regarding the jurisdiction of the court in each case which was amply shown by each record, either by recital in the judgments which were *prima facie* evidence of the truth thereof,

Simmons v. Threshour, 118 Cal. 100;
Koons v. Bryson, (C. C. A.) 69 Fed. 297,

or otherwise by the records themselves; and the decree entered in each case was binding upon the defendant and established the status of various portions of the food stuff in controversy as a contraband and otherwise worthless article of merchandise.

Kriess v. Faron, 118 Cal. 142;
Makins Produce Co. v. Callison, (Wash.) 121 Pac. 837;
Street v. Augusta etc. Co., (S. C.) 75 Am. Dec. 714, and note;
23 Cyc., 1410, and note 63.

In the first case the testimony in the present record shows that the court decreed the condemnation of the salmon upon evidence which excluded the swells, while in the other cases condemnation was ordered regardless of the particular character of the defective salmon.

The importance and materiality of the evidence and the prejudicial character of the court's error in refusing to allow these records to go in evidence hardly require comment.

V.

WE FURTHER SPECIFY AS ERROR THAT THE COURT ERRED IN REFUSING TO CHARGE THE JURY AS REQUESTED BY PLAINTIFF IN ERROR ON THE THEORY OF ESTOPPEL (Assignment XVI).

As before stated, the fourth count of the amended complaint sets forth an estoppel of defendant to assert plaintiff's failure to inspect the salmon, and is only pertinent in the event that by such failure plaintiff would otherwise be properly chargeable with the loss arising from all of the swells that were not removed from the salmon before delivery. By reason of the testimony given on defendant's behalf to the effect that all of the swells had been removed from the bulk of the salmon before its delivery, and the court's charge, as we construe it, that defendant was responsible for all after developed swells not then discernible by external inspection, the estoppel feature loses much of its significance, unless it be contended by defendant that the court's charge in this respect and the contract have been misconstrued, and that plaintiff's failure to inspect the salmon before delivery entailed upon it the loss arising from any swells existing

in the salmon at any time thereafter. Of course, inspection would not disclose the presence of swells not then discernible externally.

It will then be noted that the amended complaint alleges and the record shows, that the furnishing by the packer to the purchaser of samples of canned fish, especially do-overs, before delivery, had been customary in the trade, and particularly in the dealings between the parties hereto, for a number of years prior to 1912, and this usage formed part of the contract.

Union Ins. Co. v. American Fire Ins. Co.,
107 Cal. 327, 333;

but plaintiff was induced to accept and pay for the salmon without inspection by reason of the character of the samples and the representations of defendant's manager respecting the quality of the salmon, and plaintiff acted in sole reliance thereon (Trans. pp. 44, 47, 48, 49, 63, 64, 65, 66, 81, 83, 115, 117). This constituted a complete estoppel and was correctly set forth in plaintiff's proposed instruction No. 8 (Trans. pp. 165, 166) reading:

> "I further charge you that if you shall find that defendant misled plaintiff respecting the condition of the salmon, before its delivery to plaintiff, by leading the latter to believe that the salmon was edible and as good as, if not better than 'do-over' salmon of the same brand sold by defendant to plaintiff in previous years, and that thereby plaintiff was induced not to exercise its privilege of inspecting it, and if you shall further find that the salmon did not comply with the representations so made by defendant concerning it, or with the samples

> furnished by defendant to plaintiff, but was unmerchantable, decomposed and unfit for human consumption at the time of the delivery thereof, then you are instructed that defendant cannot assert that inspection of the salmon by plaintiff was required and that, in the absence of such inspection, no recovery can be had by plaintiff, since defendant by its conduct, in such event is prevented from relying upon the defense of inspection; and your verdict should be for the plaintiff."

The court charged the jury on this subject as follows (Trans. p. 171):

> "Should you find that the salmon, as a whole, was at the time of its delivery substantially of the character called for by the contract, as I have construed it for you, but that some of the swells and rusty tins were inadvertently or unintentionally overlooked by defendant in making its examination, that plaintiff did not exercise its privilege of inspecting such shipment before taking delivery, nor make a claim for reclamation on account of such omission within the time provided by the contract, and was not prevented therefrom by any false statement or act wilfully made or done by defendant with intent to prevent plaintiff from making such claim, then plaintiff cannot recover by reason of any damage flowing from such omission."

This instruction was erroneous for several reasons.

In the first place, this instruction virtually made bad faith an element of the estoppel. This is not required. An estoppel may arise even where there is not only no fraudulent representation but, on the contrary, where the representation upon which

the estoppel is based may have been made in perfect good faith.

Seymour v. Oelrichs et al., 156 Cal. 782, 790 et seq.

Estoppel may be based upon mere negligence without fraud of the party sought to be estopped.

Leather Manufacturers Nat'l Bank v. Morgan, 117 U. S. 96, 29 Law Ed. 811.

Said the court in the case of

Allen v. Hance, 161 Cal. 189, 196:

> "Whatever may have worked the estoppel, whether the estoppel rests in judgment, deed, contract, or *in pais,* in its essence it amounts to this, that a man is forbidden to show the existence of a fact because by his past conduct, his declarations, his agreement, his deed or a judgment, it would work an injustice and an injury to his adversary to permit him to do so."

10 Ruling Case Law, pp. 689, 691.

The court's instruction was further violated in this respect by assuming at the outset

> "That the salmon, as a whole, was, at the time of its delivery, substantially of the character called for by the contract,"

which begs the entire question for it presupposes what the jury is expressly called upon to decide.

The instruction also offends against the prohibitory provisions of the Pure Food Acts, above referred to, which, as we have seen, makes invalid any provision in a contract conflicting therewith, or any act in the performance of an otherwise valid contract, made penal by their terms; and the

instruction does violence to the contract itself regardless of these statutes in making the inadvertence or lack of intention of defendant an element of the case.

U. S. v. Sprague et al., supra;
U. S. v. 13 Crates of Frozen Eggs, supra.

The instruction is further erroneous because it is contrary to the pleadings and the evidence in the case offered by defendant, to the effect that it removed all swells before delivering the salmon.

Finally, the instruction is contrary to earlier instructions given by the court to the jury respecting the liability of defendant under the contract in question.

Nevertheless the verdict of the jury in plaintiff's favor may reasonably be construed as determining that the salmon did not comply with the contract and that defendant failed in its duty of removing the swells and that plaintiff was wrongfully prevented by defendant from making inspection of the salmon, thus establishing the estoppel contended for.

To summarize, throughout this controversy our contention has been and is now as follows:

(1) The contract for the sale and purchase of the "Archer" brand salmon was a valid contract capable of being lawfully performed.

(2) The salmon was adulterated and inedible at the time it came into the State of California within the meaning of the United States Pure Food

and Drug Act, and the State Act of similar import, and hence its importation and sale here was illegal and forbidden.

(3) The delivery of salmon of such a contraband character furnished no consideration to plaintiff for the purchase price paid by it therefor.

(4) The failure of defendant to deliver edible salmon under the contract constituted a breach thereof.

(5) Since plaintiff paid the purchase price for the salmon in ignorance of its true condition, it is entitled to either the return of its money because of the complete failure of consideration on defendant's part, or, substantial damages for the breach of the contract.

(6) Defendant is by its conduct estopped from basing any defence to the suit upon plaintiff's failure to inspect the salmon before taking delivery thereof, if this defence were otherwise of any avail.

We, therefore, respectfully submit that by reason of the errors of the trial court and the character of the verdict of the jury the judgment entered thereon should be reversed and a new trial awarded.

Dated, San Francisco,
October 2, 1917.

SAMUEL KNIGHT,
F. E. BOLAND,
Attorneys for Plaintiff in Error.